PERKINSCOIE

2015 ATO 20 (101 C)

April 27, 2015

OFFICE

Jeff S. Jordan
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 6916

Dear Mr. Jordan:

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TEO PONT CENTER

We write as counsel to the Democratic Congressional Campaign Committee ("DCCC") and Kelly Ward in her official capacity as Treasurer, and the respondents identified on Attachment A (the "Campaign Respondents"), in response to the complaint filed by the Foundation for Accountability and Civic Trust on February 16 (the "Complaint").

The Complaint was filed against 399 different respondents, and alleged no conduct by any of them that would have violated the Federal Election Campaign Act of 1971, as amended ("the Act") or Commission rules. The crux of the Complaint is that Catalist, LLC provided services at less than the normal and usual charge and served as a common vendor in violation of the coordination rules. But only a handful of Respondents even contracted with Catalist. The rest appear to have been named solely because they disclosed disbursements to NGP VAN, LLC, a vendor which, among other things, is a common provider of FEC reporting software to Democratic political committees.²

The sweeping nature of the Complaint and its lack of any basis in law or fact suggest that its purpose is to harass—and it has had just that effect. Many of the Campaign Respondents are winding down and the pendency of this Complaint prevents them from terminating, causing them unnecessary expense and inconvenience. The Complaint should be promptly dismissed and the Commission should close the file.

Legal Analysis

"The Commission may find reason to believe only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]." Additionally,

All respondents shall be referred to collectively as "Respondents."

² See, e.g., Advisory Opinion 2004-24.

³ Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, MUR 4960 (Dec. 21, 2000).

"unwarranted legal conclusions from asserted facts" and mere speculation will not be accepted as true.⁴

The Complaint makes two allegations: first, that Catalist, LLC ("Catalist") made improper inkind contributions to Respondents by charging them less than the normal and usual charge for its services and, second, that Catalist served as a common vendor to Respondents and certain unidentified outside groups in violation of the coordination rules. Both allegations fail to meet this standard and, therefore, must be dismissed.

I. Respondents Paid the Normal and Usual Charge for the Services Rendered

The Complaint alleges that Catalist made in-kind contributions to Respondents by charging them less than the normal and usual charge for its services. This claim is purely speculative and without basis. Only five of the Respondents retained Catalist between 2010⁵ and the present. The DCCC retained Catalist in 2010 to provide it with voter data descriptions, and again in 2012 to provide it with voter data to aid it in selecting its polling samples. As with the DCCC's other business dealings, the terms of the DCCC's agreements with Catalist were negotiated at arm's length between the parties, and the DCCC paid Catalist over \$170,000 for services rendered in 2010 and over \$150,000 for services rendered in 2012. The size of these fees is flatly inconsistent with a supposed "little interest in making a profit."

In addition to the DCCC, four of the Campaign Respondents purchased small lists from Catalist. Becerra for Congress, Texans for Henry Cuellar Congressional Campaign, and Garamendi for Congress paid the rate quoted to them by Catalist. Ami Bera for Congress had previously contracted with a different vendor that was subsequently acquired by Catalist, and paid Catalist at the rate it had been charged under the earlier agreement. These facts, too, are inconsistent with allegations that Respondents paid less than the normal and usual charge.

In any case, the Complaint alleges no information to show that Respondents were undercharged. It fails to present any gap between what a similarly situated consumer would have paid, and what the Respondents actually paid. Rather, it relies entirely on two "blind" quotes from a book that

⁴ *Id*.

⁵ The Complaint fails to specify when, precisely, the violations alleged therein would have occurred. As claims accruing more than five years ago are barred by the statute of limitations, this response only addresses activity that occurred from 2010 to the present. 28 U.S.C. § 2462.

⁶ According to the disclosure reports filed with the Commission, only the DCCC and four of the Campaign Respondents reported making disbursements to Catalist between 2010 and the present. See www.fec.gov. Though the Respondents retained NGP VAN, LLC, the Complaint does not allege that NGP VAN provided services at less than the normal and usual cost, nor does it provide any facts that would support such a contention. See Complaint at 24-25.

⁷ Complaint at 24.

⁸ See 11 C.F.R. § 100.52(d)(2).

assert conclusorily that Catalist "has little interest in profits" and was "more interested in keeping its prices down to help partisan and ideological allies." This kind of hearsay—"citing an unidentified source's statement that itself lacks any indicia of reliability—is not adequate support for a finding of reason to believe that the Act has been violated." In any case, the only test is whether Catalist actually charged its clients the normal and usual charge, a matter on which the Complaint is entirely silent.

II. Respondents Did Not Receive In-Kind Contributions in the Form of Coordinated Communications

The Complaint also alleges that Catalist served as a "common vendor" that made available Respondents' "client lists and voter data files" to unspecified outside groups. Accordingly, the Complaint alleges, these unspecified outside groups may have made unspecified coordinated communications that should have been treated as in-kind contributions to Respondents.

Under Commission rules, to constitute a "coordinated communication," a public communication must meet three prongs. First, it must be paid for by a person other than the candidate, authorized committee or political party committee with which it is coordinated. Second, it must satisfy one or more content standards. Third, it must satisfy one of several conduct standards.

The Complaint fails to allege specific facts to support a finding that any one of these prongs has been met. It does not point to a single specific communication that was paid for by a third party group. Nor does it identify the content of any such communication, or even when such a communication may have been distributed. In fact, for a number of Respondents, no outside groups reported making *any* independent expenditures or electioneering communications during the 2014 election cycle.¹²

Moreover, there is no factual or legal basis to find that the conduct prong was met. The Complaint asserts that Catalist served as a "common vendor" to both Respondents and outside groups. But merely sharing the same vendor is not a violation of the Act, nor does it create a presumption of coordination.¹³ Instead, a vendor is a "common vendor" under the rules only if the vendor's "usual and normal business includes the creation, production, or distribution of communications"¹⁴ and "the same vendor creates or distributes the ad alleged to be coordinated and, within 120 days, has provided specified services for the candidate alleged to have benefitted

⁹ Complaint at 20.

¹⁰ First General Counsel's Report, MUR 6506, at 5 (Feb. 15, 2013).

[&]quot; 11 C.F.R. § 109.21(a)

¹² See www.fec.gov. For example, there were no independent expenditures or electioneering communications reported supporting Becerra for Congress, Texans for Henry Cuellar Congressional Campaign, or Welch for Congress, to name a few.

¹³ See Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 436 (Jan. 3, 2003).

¹⁴ Id. at 436.

from the coordination."¹⁵ Furthermore, the vendor must have used material nonpublic information about the candidate or party committee's plans, projects, activities or needs, or information used previously in providing services to the candidate or party committee, in creating, producing or distributing the ad, or conveyed such information to the person paying for the communication.¹⁶

As described above, the vast majority of Campaign Respondents did not retain Catalist between 2010 and the present, so Catalist was not a vendor to those committees. Nor was it a "common vendor" to the DCCC or the four Campaign Respondents who did engage Catalist. According to its own website, Catalist does not appear to create or distribute communications in the normal course of its business, ¹⁷ and the Complaint does not allege anything to the contrary. ¹⁸ The DCCC took the same steps with Catalist as it does with its other vendors to ensure that its nonpublic information was kept confidential and not used by Catalist in its work with its other clients. And the four Campaign Respondents who engaged Catalist merely purchased specified lists from Catalist, so Catalist did not provided these committees with strategic help "[i]dentifying voters or developing voter lists, mailing lists, or donor lists," ¹⁹ nor did the committees provide nonpublic campaign information to Catalist. Thus, there is no basis to find that Catalist served as a "common vendor" under the rules or that Catalist improperly used or shared Respondents' information. ²⁰

The complaint also makes the vague and unsourced allegation that Catalist and NGP VAN have "joined forces," leading to the sharing of information in violation of the coordination rules. 21 While the Campaign Respondents did retain NGP VAN, the Complaint still fails to allege any specific facts with respect to NGP VAN that would trigger the conduct prong of the coordination rules. As described above, merely acting as a common vendor is not a violation of the Act, nor does it serve as prima facie evidence of coordination. The Complaint fails to allege any specific facts that show that NGP VAN created or distributed communications for outside groups, that

¹⁵ First General Counsel's Report, MUR 6077, at 7 (Apr. 20, 2009); 11 C.F.R. § 109.21(d)(4).

¹⁶ See 11 C.F.R. § 109.21(d)(4)(iii).

¹⁷ See Catalist, Products, <u>www.catalist.us/product/product.html</u> (failing to identify communication production, creation or distribution services as among its products).

¹⁸ MUR 6077, at 8.

^{19 11} C.F.R. § 109.21(d)(4)(ii).

²⁰ See, e.g., First General Counsel's Report, MUR 6570 (Oct. 22, 2012) (declining to pursue enforcement where there were no "allegations of specific conduct" that a common vendor used or conveyed nonpublic campaign information). The only "fact" that the Complaint cites to support its "common vendor" argument is an unsourced statement in The Victory Lab that, over seven years ago, a different committee was able to access voter registration information that had been collected by an outside group before the voter's application had been officially processed. Complaint at 22. This type of unsourced hearsay is inadequate to support a finding of reason to believe. First General Counsel's Report, MUR 6506, at 5. And even if it were, it shows no transfer of nonpublic information from a campaign or party committee to an outside group, but rather the reverse, which satisfies none of the conduct standards under the coordination rules. See 11 C.F.R. § 109.21(d).

show the actual transfer of information from Respondents to those outside groups, or that show that such information was material to any communication made by an outside group. And, as discussed earlier, for a number of Respondents, there were not even reported independent expenditures or electioneering communications during the 2014 election cycle. Without such facts, the Commission may not find reason to believe.²²

Lastly, even if the Complaint alleged that Catalist or NGP VAN used or conveyed Respondents' nonpublic information, the Complaint still would not allege a violation by Respondents. Under the rules, if a common vendor uses such information to create, produce, or disseminate a communication paid for by a third party, or conveys such information to the third party, the third party will have *made* an in-kind contribution in the form of a coordinated communication.²³ But the campaign or party committee does not *receive* an in-kind contribution unless it requests or suggests that the third party make the communication, is materially involved in decisions regarding the communication, or has substantial discussions with the third party in which it disclosed nonpublic and material information about its plans, projects, activities or needs.²⁴ And there is no basis to conclude that any of these other conduct standards have been met. Accordingly, the Complaint must be dismissed.²⁵

Conclusion

For the reasons described herein, we respectfully request that the Commission dismiss this matter and take no further action.

Very truly yours,

Marc Erik Elias

Andrew H. Werbrock

Counsel to Respondents

²² See First General Counsel's Report, MUR 6570; First General Counsel's Report, MUR 6077, at 7.

^{23 11} C.F.R. §§ 109.21(c)(4).

²⁴ Id. §§ 109.21(b)(2), 109.37(a)(3).

²⁵ In addition to the reasons contained herein, the complaint should be summarily dismissed as to Pam Byrnes for Congress, Ann Callis for Congress, Cannon for Congress, Swati Dandekar for Congress, Joanne Dowdell for Congress, Ebbin for Congress, Laura Fjeld for Congress Committee, Glen Gainer for Congress, Patrick Henry Hays for Congress, Ed Jany for Congress, Elisabeth Jensen for Congress, Lara for New Mexico, Lopez for Congress, Obermueller for Congress, O'Brien for Iowa, Suzanne Patrick for Congress, Committee to Elect Martha Robertson, Romanoff for Congress, Carl Sciortino Committee, Friends of Mark Sickles, Kevin Strouse for Congress, Walrond for Congress, and Aaron Woolf for Congress, because these committees have terminated in the normal course. See 52 U.S.C. §§ 30101(11), 30109(a); see also First General Counsel's Report, MUR 6638, n.21 (Oct. 25, 2013).

Attachment A

Committee to Elect Gary L. Ackerman, Inc. and Robert Barnett, Treasurer Pete Aguilar for Congress and Jennifer May, Treasurer Ikaika for Hawaii and Stacey M. Edralin, Treasurer Appel for Iowa, Inc. and Sally Pedersen, Treasurer Friends of Val Arkoosh and Margaret Sager, Treasurer Brad Ashford for Congress and Jim Olson, Treasurer Ron Barber for Congress and Laura T. Almquist, Treasurer Friends of John Barrow and Tom Bordeaux, Treasurer Karen Bass for Congress and Stephen J. Kaufman, Treasurer Beatty for Congress and Jeffrey A. Rupert, Treasurer Becerra for Congress and Robert Herrera, Treasurer Aimee Belgard for Congress and Sander Friedman, Treasurer Ami Bera for Congress and Jennifer May, Treasurer Friends of Don Beyer and Mary Margaret Whipple, Treasurer Erin Bilbray for Congress and William H. Stanley, Treasurer Sanford Bishop for Congress and Evelyn Turner Pugh, Treasurer Tim Bishop for Congress and Molly Bishop, Treasurer Blumenauer for Congress and Henry Hewitt, Treasurer Bonamici for Congress and Elise Greene, Treasurer Friends of Corrine Brown and Gloria Simmons, Treasurer Julia Brownley for Congress and Jennifer May, Treasurer Friends of Cheri Bustos and Jeanette Hunter, Treasurer Butterfield for Congress and Scott R. Falmlen, Treasurer Pam Byrnes for Congress and Vicki Hopper, Treasurer Ann Callis for Congress and Jennifer May, Treasurer Cannon for Congress and Jennifer May, Treasurer Friends of Lois Capps and Andrew Siegel, Treasurer Cartwright for Congress and Jennifer May, Treasurer Nick Casey for Congress and Martin Glasser, Treasurer Castor for Congress and Amy Diamond, Treasurer The Cicilline Committee and Nancy L. Benoit, Treasurer Katherine Clark for Congress Committee and Gemma W. Martin, Treasurer Hansen Clarke for Congress and Choi Palms-Cohen, Treasurer Peter Clemens for Congress and Tammy Clemens, Treasurer Steve Cohen for Congress and Henry M. Turley, Treasurer Cohn for Congress 2014 and Bob Friedman, Treasurer Cole for Congress and Nicholas Finc, Treasurer Elizabeth Colbert Busch for Congress and Claus Busch, Treasurer Connolly for Congress and John N. Jennison, Treasurer Courtney for Congress and Timothy J. Poloski, Treasurer Crowley for Congress and Scott G. Kaufman, Treasurer Texans for Henry Cuellar Congressional Campaign and Rosendo Carranco, Treasurer Swati Dandekar for Congress and Dennis J. Naughton, Treasurer DeFazio for Congress and Jef Green, Treasurer Diana DeGette for Congress and Edgar L. Neel, Treasurer

Friends of John Delaney and April McClain-Delaney, Treasurer Friends of Rosa DeLauro and Patrick Charmel, Treasurer Suzan Delbene for Congress and Jay Petterson, Treasurer Ted Deutch for Congress and Jeffrey Weinstock, Treasurer Debbie Dingell for Congress and Martha Darling, Treasurer Doggett for Congress and James Cousar, Treasurer Joanne Dowdell for Congress and Joanne Dowdell, Treasurer Duckworth for Congress and Nancy Chen, Treasurer Ebbin for Congress* Donna Edwards for Congress and Janice Edwards, Treasurer Ehrlich for Congress and Kirsten L. Koester, Treasurer Sean Eldridge for Congress and Mike Oates, Treasurer Ellison for Congress and Carla Kielberg, Treasurer Committee to Elect Leslie to Congress and Judy Pingel, Treasurer Enyart for Congress and Brent Gaines, Treasurer Euille for Congress and Lynnwood Campbell, Treasurer Friends of Farr and Sidney Slade, Treasurer Fattah for Congress and Roger Jackson, Treasurer Laura Fjeld for Congress Committee* Bill Foster for Congress and Aesook Byon, Treasurer Foust for Congress and Sue Boucher, Treasurer Lois Frankel for Congress and Janica Kyriacopoulos, Treasurer Tulsi for Hawaii and Talia Tamayo Khurana, Treasurer Glen Gainer for Congress Jennifer May, Treasurer Friends of Pete Gallego and Chris Koob, Treasurer Gallego for Arizona and Rebecca Wininger, Treasurer Garamendi for Congress and Janica Kyriacopoulos, Treasurer Joe Garcia for Congress and Roland Sanchez-Medina, Treasurer Malcolm Graham for Congress and Donnie T. Simmons, Treasurer Greenstein for Congress and Jennifer May, Treasurer Wendy Greuel for Congress and Stephen J. Kaufman, Treasurer A Whole Lot of People for Grijalva and Maya Castillo, Treasurer Janice Hahn for Congress and James Cross, Treasurer Patrick Henry Hays for Congress and Mike Hays, Treasurer Higgins for Congress and Gary M. Kanaley, Treasurer Jim Himes for Congress and Kathleen Warner, Treasurer Ruben Hinojosa for Congress and Vickie L. Winpisinger, Treasurer Mike Honda for Congress and Vicki Day, Treasurer Hope for Congress and Elizabeth L. Wildhack, Treasurer Horsford for Congress and Michael Kern, Treasurer Hoyer for Congress and Amy Pritchard, Treasurer Huffman for Congress 2014 and Stacy Owens, Treasurer Steve Israel for Congress Committee and Harris Wiener, Treasurer Ed Jany for Congress and Jennifer May, Treasurer Jeffries for Congress and Zachary Karson, Treasurer

Committee to Re-Elect Henry "Hank" Johnson and Malcolm A. Cunningham, Treasurer Anesa for Iowa and Eric Bearbower, Treasurer Kaptur for Congress and Thomas Jaffee, Treasurer Robin Kelly for Congress and Ryan VanMeter, Treasurer Joe Kennedy for Congress and David N. Martin, Treasurer Friends of Dan Kildee Campaign Committee and Jeffrey D. Tippett, Treasurer People for Derek Kilmer and Jay Petterson, Treasurer Kind for Congress and Charles Marx, Treasurer Kirkpatrick for Arizona and Daniel Flores, Treasurer Korpe for Congress and Satish Korpe, Treasurer Kultala for Congress and Carol Marinovich, Treasurer Kuster for Congress and Charles G. Willing, Jr., Treasurer Laferla for Congress and Frances Miller, Treasurer Langevin for Congress and Edward Giroux, Treasurer Lara for New Mexico and Jennifer May, Treasurer Larson for Congress and Barry Feldman, Treasurer Brenda Lawrence for Congress and Joe Livoti, Treasurer Barbara Lee for Congress and Loraine Binion, Treasurer John Lewis for Congress and Michael Collins, Treasurer Loebsack for Congress and Ian J. Russell, Treasurer Lofgren for Congress and Mark B. Fredkin, Treasurer Lopez for Congress and Amy Lewis, Treasurer Nita Lowey for Congress and Melnikoff, Treasurer People for Ben and Carmen Lujan, Treasurer Stephen Lynch for Congress and Brian Miller Treasurer Friends of Tate Macqueen and Lori Murphy, Treasurer Friends of Don Maffei and Herbert Millanc, Treasurer Maloney for Congress and Melissa Mendez, Treasurer Sean Patrick Maloney for Congress and Jennifer May, Treasurer Marjorie 2014 and Jennifer May, Treasurer Matsui for Congress and David K. Murphy, Treasurer McAffrey for Congress and John David Stinson, Treasurer Erin McClelland for Congress and Douglas A. Campbell, Treasurer McCollum for Congress and Mary Pat Lee, Treasurer Re-Elect McGovern Committee and William Talcott, Treasurer Bobby for Michigan and Daniel B. Pydyn, Treasurer Friends for Gregory Meeks and Patsy Simmons, Treasurer Norm Mosher for Congress and Samantha Van Saun, Treasurer James Mower for Congress and Dennis Skinner, Treasurer Friends of Patrick Murphy and Brian Foucart, Treasurer Pat Murphy for Iowa and Vicki Krug, Treasurer Nadler for Congress and Lewis Weissman, Treasurer Friends of Shaughnessy Naughton and Joshua Morrow, Treasurer Nolan for Congress Volunteer Committee and James A. DeChaine, Treasurer O'Brien for Iowa and J. Daniel Holm, Jr., Treasurer Obermueller for Congress*

Beto O'Rourke for Congress and Susannah Byrd, Treasurer Parrish for Congress and Jennifer May, Treasurer Pascrell for Congress and Anne Hutton, Treasurer Suzanne Patrick for Congress and Jennifer May, Treasurer Donald M. Payne, Jr. for Congress and H. O'Neil Williams, Treasurer Nancy Pelosi for Congress and Steven Swig, Treasurer Perlmutter for Congress and Karen J. Rokala, Treasurer Scott Peters for Congress and Nicholas R. Femia, Treasurer Pingree for Congress and Anne M Rand, Treasurer Mark Pocan for Congress and Sondy Pope, Treasurer Quigley for Congress and Erica Kelly, Treasurer Keep Nick Rahall in Congress Committee and Edward Rahall, Treasurer Rangel for Congress and David Patterson, Treasurer Eloise Gomez Reyes for Congress and William Smith, Treasurer Richmond for Congress and Maple Gaines, Treasurer Committee to Elect Martha Robertson and Enid Littman, Treasurer Robles for Congress and Silvia Castro, Treasurer Romanoff for Congress* Americans for Gabriel Rothblatt and Taj Rothblatt, Treasurer Lucille Roybal-Allard for Congress and A. Christian Hart, Treasurer Dr. Raul Ruiz for Congress and John Pinkney, Treasurer Tim Ryan for Congress and Alan Ryan, Treasurer Committee to Re-Elect Loretta Sanchez and Katharine Meyer Borst, Treasurer Friends of John Sarbanes and Meghan Stumpf, Treasurer Schertzing for Congress and Mary Ruttan, Treasurer Schiff for Congress and Stephen J. Kaufman, Treasurer Schneider for Congress and Harry Pascal, Treasurer Kurt Schrader for Congress and Jef Green, Treasurer Carl Sciortino Committee and Francis P. Brown, Treasurer Terri Sewell for Congress and Edward A. Hosp, Treasurer Carol Shea-Porter for Congress and William Duncan, Treasurer Sherman for Congress and Stephen J. Kaufman, Treasurer Linda Sherrell for Congress and Richard Laroche, Treasurer Krysten Sinema for Congress and Judith Allen, Assistant Treasurer Alex Sink for Congress and Jennifer May, Treasurer Sinner for Congress and Jon Ewan, Treasurer Louise Slaughter Re-Election Committee and Nora Tuthill, Treasurer Friends of Mark Sickles and Charles Chambers, Treasurer Kevin Strouse for Congress and Ronald L. Fader, Treasurer Swalwell for Congress and Shannon Fuller, Treasurer Mark Takai for Congress and Edward Kaimihana, Treasurer Mark Takano for Congress and Jennifer May, Treasurer Mike Thompson for Congress and Tom Hannigan, Treasurer Tierney for Congress and George Atkins, Treasurer Gloria Bronell Tinubu for Congress and Donald L. Fowler, Treasurer Titus for Congress and Jennifer May, Treasurer

Paul Tonko for Congress and Patrick Bulgaro, Treasurer Vanderstelt for Congress and Deanna Taylor, Treasurer Van Hollen for Congress and Stacey Maud, Treasurer Marc Veasy Congressional Campaign Committee and Charles Langham, Treasurer Committee to Re-Elect Nydia M. Velazquez to Congress and Betty Diana Arce, Treasurer Monica Vernon for Congress and Bob Rush, Treasurer Citizens for Michael Wager and Peggy Gries Wager, Treasurer Margie Wakefield for Congress and Doni Mooberry Slough, Treasurer Walrond for Congress and Torian Robinson, Treasurer Tim Walz for US Congress and Gerald Maschka, Treasurer Debbie Wasserman Schultz for Congress and Larry Wasserman, Treasurer Welch for Congress and Jack Candon, Treasurer Corry Westbrook for Congress and Catherine Wenzing, Treasurer Mary Rose Wilcox for Congress and Aaron Kizer, Treasurer Frederica S. Wilson for Congress and Larry R. Handfield, Treasurer Aaron Woolf for Congress and Sue E. Montgomery Corey, Treasurer Yarmuth for Congress and Sarah J. Martin, Treasurer Rob Zerban for Congress and Randy Bryce, Treasurer

^{*}These committees have terminated, and the most recent treasurer of record was not available to execute a Statement of Designation of Counsel form. Statements of Designation of Counsel have been executed by the former candidate.